FILED
(1) 982041 APR 14 1999

No. _____

IN THE

Supreme Court of the United States

October Term, 1998

GARY B. JEFFERSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Gary B. Jefferson
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Pro Se Petitioner

48pp

QUESTIONS PRESENTED

1. Does the continuous or simultaneous adjudication of a federal employee's Federal Workers' Compensation Act claim and Federal Torts Claim Act litigation create a conflict in "F.E.C.A." administration?

2. Does the legal issues utilized in the Ninth Circuit's calculation of accrual cause a conflict in statutory construction or application where allegations of concealment of vital information prevents the petitioner from alleging crucial elements of his claim?

3. Does the legal issues presented in **Gibson v. United States**, 781 F.2d 1334, 1344 (9th Cir. 1986) cause a conflict in statutory construction or application where allegations of fraudulent concealment capable of tolling the statute of limitations are in question?

4. Where legal issues are in dispute, does the procedures utilized in the Ninth Circuit's award of summary judgment cause a denial of due process?

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When the appearance of justice has been tainted by jeopardy of procedurally insufficient ruling, both ethical integrity is offended and public trust in our legal system devastated.

1. The continuous or simultaneous adjudication of a federal employee's Federal Workers' Compensation Act claim and Federal Torts Claim Act litigation in the U.S. District Court creates a conflict in *administration* where the F.E.C.A. decision, though not mandatory, grants review based on the merits of "identical" issues characterized as meritless by the appellate court.

2. The legal issues utilized in the Ninth Circuit's calculation of accrual cause a conflict in statutory construction and application where allegations of concealment of vital information prevents the petitioner from alleging crucial elements of his claim. **Liuzzo v. United States,** 485 F. Supp. 1274 (E.D. Mich.1980)

3. The legal issues presented in **Gibson v. United States**, 781 F.2d 1334, 1344 (9th Cir. 1986) cause a conflict in statutory construction and application where allegations of fraudulent concealment capable of tolling the statute of limitations are in question. **Hohri v. United States,** 782 F2d. 227 (D.C. Cir. 1986)

4. Where legal issues are in dispute, the procedures utilized in the Ninth Circuit's award of summary judgment causes a denial of due process by inverting the burden of proof. **Celotex Corp. v. Catrett,** 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.ED.2d 265 (1986)

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No. _____

IN THE
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October Term, 1998

GARY B. JEFFERSON,
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On petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished opinion of the Ninth Circuit Court of Appeals, entered on August 20, 1998 and denial of appellant's Petition for Rehearing, entered on January 14, 1999, appear in the appendix hereto, as **Appendices A and B** respectively. The Central District Findings of Fact, Conclusions of Law, and Judgment is attached hereto as **Appendix C**; its Order Denying Plaintiff's Motion For reconsideration appears in the appendix hereto, as **Appendix D**.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1); i.e.., that the Supreme Court may review cases in the federal courts of appeal by writ of certiorari granted upon petition. The unpublished

opinion of the Ninth Circuit Court of Appeals was entered on August 20, 1998. The Ninth Circuit's order denying appellant's Petition for Rehearing and rejection of Suggestion for Rehearing En Banc was entered on January 14, 1999. This petition for certiorari is being filed within 90 days of that date after the United States Supreme Court denied petitioner's Application for Extension on April 7, 1999.

STATUTES INVOLVED

The statutory construction and application of the following titles are the bases for the complaints in this petition for writ of certiorari to the United States Supreme Court:

1. 5 U.S.C. 8123
2. 5 U.S.C. 8128(a)
3. 28 U.S.C. 1346(b), 2671 et seq.
4. 28 U.S.C. 2401(b)

STATEMENT OF CASE

On March 31, 1995, petitioner filed his Federal Torts Claim Act ("FTCA") complaint in the United States District Court for the Central Division alleging tortious conduct arising from events that occurred during the processing of his Federal Workers' Compensation Act ("FECA") claim. On March 22, 1996, the court entered its order granting defendant's motion to dismiss with leave to amend as to FTCA claim; and granting defendant's motion for summary judgment as to plaintiff's procedural due process claim. On April 1, 1997, the court entered its judgment granting summary judgment in favor of defendant United States of America. Plaintiff petitioned the court for relief via motion for reconsideration pursuant to Rule 59(e) of the Fed.R.Civ.P. **(C.R. 107)** which was denied and entered on May 23, 1997 **(C.R. 117)**. Plaintiff subsequently filed his Notice of Appeal within 60 days of the original order granting defendant United States summary judgment. The Ninth Circuit Court of Appeals entered its affirmation of the district court's award of summary judgment on

August 20, 1998. Plaintiff filed his petition for rehearing on October 9, 1998 which was denied by order and filed on January 14, 1999.

On November 25, 1998, one month after the petitioner submitted his Petition For Rehearing, two specific federal regulations, inter alia, were published[1] but enacted while the petitioner's claim was pending appeal to the Ninth Circuit (submitted November 16, 1997). Each new regulation is aimed at curtailing activities that the petitioner has alleged as being violated in his action since 1983. Petitioner also pointed out the fact that 5 U.S.C. 8123 already provides the same protection; i.e.., against tampering with physicians, their reports, and the forms designed to protect a whole class of individuals; federal employees covered under the Federal Employees' Compensation Act (5 U.S.C. 8101 et seq.). These new federal regulations, 20 C.F.R. 10.7(a) and 20 C.F.R. 10.506 both mirror the intent of 5 U.S.C. 8123. The significance here is that [a]ll of the petitioner's claims, contrary to the decision rendered below, did not occur on or before 1991. The petitioner's workers' compensation claim was viable and still being adjudicated up to and through 1996. A November 28, 1995 copy of the Office of Workers' Compensation *Memorandum To The Director* is attached below as **Appendix E. (C.R. 82 at page 53).** To date, petitioner's work related injuries remain compensable under the F.E.C.A. The case thus presents important questions under the Constitution of the United States, namely the Fourteenth Amendment; the subtle erosion of life, liberty, and due process, including statutory and legal principles. Petitioner's administrative claim and subsequent torts claim action in the District Court is predicated upon *recurrent negligent processing* of his workers' compensation claim. Petitioner submitted sufficient evidence; i.e., affidavits, declarations, and admissions under oath by agents of the defendant admitting to or proving that a *pattern of conduct* exist which was both continuous and unlawful. Conduct to

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[1]20 CFR (Code of Federal Regulations) Parts 10 and 25; published in the Federal Register, November 28, 1998 (63 FR 65284).

which the respondent does not deny. As a result, the petitioner should have prevailed with judgment as a matter of law where:
(1) requirements of Fed.R.Civ.P 56(c)are not met;
(2) where fraudulent concealment is entwined; **Holmberg v. Armbrecht,** 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946). (Quoting **Bailey v. Glover,** 88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 (1874), **Hohri v. United States,** 782 F2d. 227 (D.C. Circuit); factual disputes as to the extent of the governments concealment precludes summary judgment. **Liuzzo v. United States,** 485 F. Supp. 1274 (E.D. Mich.1980).
(3). where continuous torts are entwined; **Gross v. United States,** 723 F.2d 609 (1983); 676 F.2d 295 (1982); **Sheehan v. United States** 896 F.2d 1168 (9th Cir. 1990); where concealment of the last tort, accrual from date plaintiff became or reasonably should have become knowledgeable about injury and its cause. **Peck v. United States** (1979, SD NY) 470 F.Supp. 1003).

Thus those claims occurring in 1992 are timely under 5 U.S.C. 2401(b) as a result of the April 5, 1994 filing of petitioner's administrative claim but ruled "meritless" by de facto judicial jurisdiction--jurisdiction that congress delegated to the Secretary of Labor under the "F.E.C.A." (5 U.S.C. 8101 et seq.) resulting in a conflict of statutory construction and application of titles 5 U.S.C. 8123 and 5 U.S.C. 8128(a), and "inconsistency" with long-established policies of the U.S. Department of Labor.

REASONS FOR GRANTING REVIEW

When the appearance of justice has been tainted by jeopardy of procedurally insufficient ruling, both ethical integrity is offended and public trust in our legal system devastated.

1. The continuous or simultaneous adjudication of a federal employee's Federal Workers' Compensation Act claim and Federal Torts Claim Act litigation in the U.S. District Court creates a conflict in administration where the F.E.C.A. decision, though not mandatory,

grants review based on the merits of identical issues characterized as meritless by the appellate court.

The decision of the Ninth Circuit Court of Appeals has created an intolerable conflict in administration of claims covered under the "FECA" where decision , though not mandatory, grant review based on the merits of identical issues characterized as "meritless" by the appellate court. This decision is not only at war with the well established statutory construction and application of titles 5 U.S.C. 8123 and 5 U.S.C. 8128(a) but is also "inconsistent" with long-established policies of the U.S. Department of Labor. Reviews of administrative claims under 5 U.S.C. 8128(a), though not mandatory, are based on the merits of newly presented evidence. **Appendix C. (C.R. 82 at page 53).** Thus a discretional function bestowed upon the Secretary of Labor by congressional intent. The consequences of appellate ruling has thus rendered a whole class of federal employees covered under the "FECA" (5 U.S.C. 8101 et seq.) susceptible to de facto judicial jurisdiction where congressional intent sought to restrict.

2. The legal issues utilized in the Ninth Circuit's calculation of accrual causes a conflict in statutory construction and application where allegations of concealment of vital information prevents the petitioner from alleging crucial elements of his claim. **Liuzzo v. United States,** 485 F. Supp. 1274 (E.D. Mich.1980).

This decision has created an intolerable conflict for federal employees covered under the "FECA" by ruling conduct restricted by 5 U.S.C. 8123[2] "meritless". The appellate court decision is not only at war with the well established statutory construction and application of the statute but is also "inconsistent" with long-established policies[3]

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[2]illegal contact: illegal telephone calls; inaccurate, outdated, and biased physician referral forms and "Statement of Accepted Facts"; shopping around for opinions in support

[3]psychological testing as required ; timely processing of claims;

of the U.S. Department of Labor. The holding in **Liuzzo v. United States,** 485 F. Supp. 1274 (E.D. Mich.1980) is an analogous case where the claim did not accrue until plaintiffs had reason to believe government agent was person who caused injury where agent and other government officials, including the President, had asserted that other persons were responsible. Here, the petitioner's knowledge was limited to what the government provided; namely, that the evidence was exculpatory and thus inadequate for reversal. Petitioner was diligent and made numerous document requests under the Freedom of Information Act ("FOIA") to which the respondent falsely claimed compliance **[C.R. 69 at pages 30 - 31 (Admissions & Responses 31, 32, 34)--attached hereto as Appendix D].** For the first time, several of the torts characterized by the Court as "time-barred" surfaced as a result of discovery in another unrelated court action in 1992 **(C.R. 82/Calliet deposition)**. It was at this time petitioner learned of the government's role in the *continuous* fraudulent processing of his "FECA" claim; a pattern of conduct covering a period of 15 years. Prior to that date there was no evidence of any "pattern of unlawful conduct" on anyone's behalf. One obvious reason, the petitioner never saw the same referral doctor on more than one occasion. At that time, the record reflected isolated and sporadic incidents to which the petitioner filed numerous petitions under 5 U.S.C. 8128(a) as provided. Subsequently, petitioner filed his administrative claim within two years of the discovery date of a "pattern of unlawful conduct". Conduct restricted by 5 U.S.C. 8123 and, as a result of appellate ruling by the Ninth Circuit rendering identical conduct "meritless", causing a conflict and de facto judicial jurisdiction where congress specifically delegated those matters to the Secretary of Labor.

3. The legal issues presented in **Gibson v. United States**, 781 F.2d 1334, 1344 (9th Cir. 1986) cause a conflict in statutory construction and application where allegations of fraudulent

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acquisition of second medical opinions as required

concealment capable of tolling the statute of limitations are in question. **Hohri v. United States,** 782 F2d. 227 (D.C. Cir. 1986).

The decision of the Ninth Circuit Court of Appeals has created an intolerable condition for federal employees covered under the "FECA" by ruling conduct restricted by 5 U.S.C. 8123 and capable of tolling the statute of limitations under allegations of fraudulent concealment, "meritless". The consequences of this appellate ruling has thus rendered a whole class of federal employees susceptible to de facto judicial jurisdiction where congressional intent sought to restrict by bestowing jurisdiction upon the Secretary of Labor. Thus petitioner should have benefited from the theory of fraudulent concealment, **Holmberg v. Armbrecht,** 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946). (Quoting **Bailey v. Glover,** 88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 (1874), **Hohri v. United States,** 782 F2d. 227 (D.C. Circuit) where the defendant is "impeached" and later submits testimony that corroborates the petitioner's claims as viable genuine factual issues affecting the calculation of accrual (i.e., fraud, deceit, and concealment of vital information that prevented the petitioner from alleging crucial elements of his claim, namely, that these were continuous torts--"a pattern" of both continuous and unlawful conduct). **(See C.R. 87/Statement of Genuine Issues In Opp.)**

4. Where legal issues are in dispute, the procedures utilized in the Ninth Circuit's award of summary judgment causes a denial of due process by inverting the burden of proof. **Celotex Corp. v. Catrett,** 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

An award of summary judgment where there exists genuine issues of material fact, the conditions of Fed.R.Civ.P 56(c) are not met, and all reasonable inferences and genuine factual disputes are in favor of the movant denies due process by inverting the burden of proof. Although, once confronted, plaintiff must adequately refute allegations with viable material factual issues, he is still [g]uaranteed that the evidence will be viewed in the light most favorable to the him

and all reasonable inferences will be drawn in his favor, **Poller v. Columbia Broadcasting System, Inc.,** 386 U.S. 464, 473, 82 S.CT. 486, 491, 7 L.Ed.2d 458 (1962). The Court cannot justify a ruling of time-barr where a petitioner submits affidavits that prove on the face of the record that his F.E.C.A. claim was still being adjudicated up to and through 1996, his administrative claim submitted on April 5, 1994 and where the affidavits are uncontested by the respondent. **Matsushita Elec. Industrial Co. v. Zenith Radio,** 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A ruling that all plaintiff's claims accrued on or before 1991 constitutes a deprivation of due process under the current conditions; especially where the petitioner's legal action is predicated upon continuous and unlawful activity up to and through 1996; unlawful activity that the respondent does not deny but rather pleads exemption under the F.E.C.A. to which none applied. A party is entitled to summary judgment where the documentary evidence produced by the parties permits one conclusion. **Anderson v. Lobby, Inc.,** 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.E.d.2d 202 (1986). Summary judgment should be granted if there are no genuine issues of material fact and the conditions of Fed.R.Civ.P. 56(c) are met, **Celotex Corp. v. Catrett,** 477 U.S. 317, 322-23, 106 S.CT. 2548, 2552, 91 L.ED.2d 265 (1986). Because credibility is not an issue on summary judgment, the nonmovant's evidence must be accepted as true for purpose of the motion. The court cannot discount a nonmovant's affidavit for lack of credibility, and it must draw all reasonable inferences and resolve all genuine factual disputes in favor of the nonmovant. Reasonable doubts as to the existence of a material factual issue resolved against the nonmoving party denies due process where petitioner submits affidavits, declarations, and admissions under oath by agents of the defendant admitting to or proving that a "pattern of conduct" exists which was both continuous and unlawful. A pattern of conduct to which the respondent does not deny and allegations that the court could not and did not dismiss under Fed.R.Civ.P. 12(b)(1) or 12(b)(6). **(See C.R. 87 at pages 2-10/Alleged Uncontroverted Facts And Opposition's Response)**

Under the "FTCA", a continuing tort is sufficient to toll statute of limitations. Continuing tort sufficient to toll statute of limitations prescribed by 28 U.S.C. 2401(b) is occasioned by continued unlawful acts, not by ill effects from original tort. **Maslauskas v. United States.** (1984, DC Mass) 583 F.Supp. 349; **Doe v. Blake** 809 F.Supp. 1020 (D.Conn 1992); **Ward v. Caulk**, 650 F.2d 1144-47 (9th Cir. 1981) "[a] continuing violation is occasioned by continuing unlawful acts, not by continued ill effects from the original violation." Accordingly, effect on accrual is such that accrual starts from the last tort. Exception to the general rule that claim accrues under the FTCA when claimant learns of his injury and its cause exists when a defendant's conduct constitutes a continuing tort. 28 U.S.C. 1346(b), 2671 et seq., **Gross v. United States**, 723 F.2d 609 (1983); 676 F.2d 295 (1982); **Sheehan v. United States** 896 F.2d 1168 (9th Cir. 1990). As shown by opinion below, this case involves the interpretation of the statute of limitations under 28 U.S.C. 2401(b) and the calculation of accrual which, in its application to the petitioner, has been construed to cause several conflicts in the administration of the "FECA" and tainted the "appearance of justice". Reasonable doubts as to the existence of a material factual issue are resolved against the moving party, **T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n**, 809 F2d. 626, 630 (9th Circuit 1987)[4].

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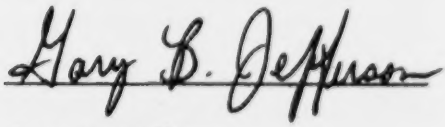
[4]Over 70 new actions referenced in Shepard's Citations; 65 pending in the 9th Circuit alone.

CONCLUSION

The Supreme Court should grant Certiorari and thereafter vacate the August 20, 1998 unpublished opinion and Judgment of the Ninth Circuit. As an alternative, a ruling of summary reversal and judgment as a matter of law should be granted.

DATED: June 15, 1999

Respectfully submitted,



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APPENDIX A.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY B. JEFFERSON	)	No. 97-55822
	)	
Plaintiff-Appellant,	)	D.C. No. CV-95-2113-RMT
	)	
v.	)	MEMORANDUM*
	)	
UNITED STATES OF AMERICA,	)	**FILED**
	)	AUG 20 1998
Defendant-Appellee.	)	Cathy A. Catterson, Clerk
	)	U.S. Court of Appeals

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Submitted August 17, 1998**

Before: O'SCANNLAIN, RYMER, and HAWKINS, Circuit Judges.

Gary B. Jefferson appeals pro se the district court's summary judgment for defendant in his Federal Tort Claims Act ("FTCA") action alleging tortious conduct arising from events that allegedly occurred during the processing of his Federal Employees'

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36.3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed.R.App.P. 34(a); 9th Cir.R. 34-4.

Compensation Act ("FECA") claim. We have jurisdiction pursuant to 28 U.S.C. 1291. We review *de novo, see Bagdadi v. Nazar*, 84 F.3d 1194, 1197(9th Cir. 1996), and we affirm.

We reject Jefferson's contention that the district court erred by concluding that his suit was time-barred because he failed to present his claim to the appropriate agency within two years of the accrual of the claim. *See* 28 U.S.C. 2401(b); *see Gibson v. United States of America*, 781 F.2d 1334. 1344 (9th Cir. 1986). The acts that Jefferson claims violated the FTCA occurred between May, 1988 and April, 1990. Jefferson was aware of his alleged injury as early as 1991. *See id.* However, Jefferson did not file his administrative claim until April 5, 1994. Accordingly, the district court did not err by finding that Jefferson's claims against defendant are barred. *See 28 U.S.C. 2401(b); Bagdadi v. Nazar*, 84 F.3d at 1197.

We also reject Jefferson's contentions that the district court abused its discretion by denying his motion for reconsideration because Jefferson failed to demonstrate a sufficient basis for relief. *See School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993).

We have considered Jefferson's remaining contentions and find that they are meritless.

AFFIRMED.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY B. JEFFERSON	)	No. 97-55822
	)	
Plaintiff-Appellant,	)	D.C.#. CV-95-02113-RMT
	)	Central California
	)	(Los Angeles)
v.	)	
	)	ORDER
UNITED STATES OF AMERICA,	)	
	)	**FILED**
Defendant-Appellee.	)	JAN 14 1999
_____	)	Cathy A. Catterson, Clerk
		U.S. Court of Appeals

Before: O'SCANNLAIN, RYMER, and HAWKINS, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed.R.App.P. 35.

Accordingly, the petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. No further filings will be accepted in this closed docket.

APPENDIX C.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY B. JEFFERSON	)	CASE No. 97-55822 RMT
	)	(BQRx)
Plaintiff,	)	
	)	FINDINGS OF FACT
vs.	)	AND CONCLUSIONS
	)	OF LAW
UNITED STATES OF AMERICA,	)	
	)	**ENTERED**
Defendant.	)	APR 1 1997
	)	Clerk, U.S. District Court
		Central District Of California

This matter having come before the court on the motion by defendant United States of America to dismiss, or in the alternative, for summary judgment, and the court having considered the pleadings and other documents filed herein, the court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff, Gary B. Jefferson (hereinafter "plaintiff") has brought this action against defendant, United States of America (hereinafter "defendant") pursuant to the Federal Tort Claims Act, 38 U.S.C. Sections 2671-80 (hereinafter "FTCA").

2. Plaintiff has alleged the reckless or negligent infliction of severe emotional distress resulting from certain alleged events during the administrative processing of plaintiff's Federal Employees' Compensation Act claim. Specifically, plaintiff has alleged that actions of the Employees' Compensation and Appeals Board (hereinafter "ECAB"), United States Department of Labor's Office of Workers' Compensation Programs (hereinafter "OWCP"), and the United States Postal Service ("Postal Service") violated the FTCA.

3. On January 11, 1983, while performing his duties as a mail carrier employed by the Postal Service, plaintiff was attacked by a dog. As a result, plaintiff suffered physical injuries to his back.

4. Plaintiff subsequently filed a federal workers' compensation claim under the Federal Employees' Compensation Act (hereinafter "FECA") and received continuation of pay and compensation for temporary total disability from January 12, 1983 through August 9, 1984.

5. On June 27, 1984, having determined that plaintiff was capable of working in a light-duty position, the OWCP ordered plaintiff to report for work. Plaintiff did not report to work as instructed, and consequently, his compensation benefits were terminated on August 9, 1984. The Postal Service terminated plaintiff October 1, 1984.

6. Plaintiff has challenged the decision to terminate his benefits for approximately twelve years. During this time, he has pursued multiple appeals with the OWCP and ECAB without success.

7. On April 5, 1994, plaintiff filed an administrative tort claim with the United States Department of Labor pursuant to the FTCA. In his administrative tort claim captioned "Final notice of attempt to Settle Claim" plaintiff stated the following:

> all matters of concern are those aforementioned in the plaintiff's April 16, 1993 Reconsideration Request to the EMPLOYEES' COMPENSATION APPEALS BOARD, February 10, 1992 APPLICATION FOR REVIEW by the EMPLOYEES' COMPENSATION BOARD, including but not limited to those allegations of erroneous interpretations, illegal contact with INDEPENDENT MEDICAL EXAMINER, submission of incompatible review material, fallacious

use of medical rationale doctrine; all leading to an unconstitutional usage of power.

8. In his Application for Review dated February 10, 1992, plaintiff took issue with Independent Medical Examiner, Dr. Herbert A. Robinson's oral/telephonic contact with the OWCP, the OWCP's alleged submission of incompatible review material to Dr. Robinson, and the ECAB's alleged failure to exclude an "improperly obtained" supplemental report from Dr. Robinson. Dr. Robinson's oral contact with OWCP and submission of his supplemental report occurred in 1988.

9. In his "petition to reconsider" dated April 16, 1993 to ECAB, plaintiff objected to the alleged submission of incompatible review material to Dr. Robinson, and the ECAB's alleged failure to exclude an "improperly obtained" supplemental report from Dr. Robinson.

10. Plaintiff objected as early as 1991 regarding the claims he presented to the Department of Labor in his administrative tort claim which was filed with that agency on April 5, 1994. In his request for reconsideration dated November 1, 1991, plaintiff objected to Independent Medical Examiner Dr. Herbert A. Robinson's oral/telephonic contact with the OWCP, the OWCP's alleged submission of incompatible review material to Dr. Robinson, and the ECAB's alleged failure to exclude an "improperly obtained" supplemental report from Dr. Robinson.

Any finding of fact which may be deemed a conclusion of law is hereby incorporated into the Conclusions of Law below, and any conclusion of law which may be deemed a finding of fact is hereby incorporated in the Findings of Fact above.

CONCLUSIONS OF LAW

1. Plaintiff has alleged that the Employees' Compensation and Appeals Board violated the Federal Torts Claim Act. However,

it is well established that judges have absolute immunity from suits sounding in tort. E.g., Bradley v. Fisher, 80 U.S. (13 Wall) 335 (1871). This immunity has been expressly extended to judicial acts under the FTCA. Cromelin v. United States, 177 F.2d 275 (5th Cir. 1949), cert denied, 339 U.S. 944 (1950); see also Foster v. MacBride, 521 F.2d 1304, 1305 (9th Cir. 1975). Such judicial immunity also attaches in administrative settings when the administrative process is "functionally comparable" to the judicial process. Butz v. Economou, 438 U.S. 478 (1978). Consequently, administrative law judges and other individuals and entities performing "judge-like" functions are immune from tort prosecution. Id.; Sellars v. Procunier, 641 F.2d 1295, 1299-1300 (9th Cir. 1981), cert. denied, 454 U.S. 1102 (1981).

The acts of the ECAB are properly described as "judge-like" in that they are the critical element of an adjudicatory process. Thus, the adjudicatory nature and function of the ECAB render it immune from prosecution under the FTCA.

2. The statute of limitations bars plaintiff's remaining claims. Plaintiff has alleged that the OWCP and the Postal Service committed acts in violation of the FTCA. 28 U.S.C. Sections 2401(b) requires that a plaintiff alleging such violation first file an administrative claim within two years of the alleged act. Plaintiff has claimed that the acts involving the OWCP and Postal Service occurred between May, 1988 and April, 1990. Consequently, plaintiff's claims against these entities were time-barred as of April, 1992, at the latest. Plaintiff having filed his administrative claim with the Department of Labor on April 5, 1994, nearly four years after the last alleged tortious act, his action is barred by the statute of limitations.

3. Accordingly, summary judgment should be granted in favor of the defendant.

Dated: March 31, 1997

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY B. JEFFERSON	)	CASE No. 97-55822 RMT
	)	(BQRx)
Plaintiff,	)	
	)	ORDER GRANTING
vs.	)	DEFENDANT'S
	)	MOTION FOR
UNITED STATES OF AMERICA,	)	SUMMARY JUDGMENT
	)	
Defendant.	)	**ENTERED**
	)	APR 1 1997
		Clerk, U.S. District Clerk
		Central District Of California

This matter having come before the court on the motion by defendant United States of America to dismiss or, in the alternative, for summary judgment, and the court having considered the pleadings and other documents filed herein, and having issued findings of fact and conclusions of law concurrently herewith,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is GRANTED.

Dated: March 31, 1997

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY B. JEFFERSON	)	CASE No. 97-55822 RMT
	)	(BQRx)
Plaintiff,	)	
	)	JUDGMENT
vs.	)	
	)	**ENTERED**
UNITED STATES OF AMERICA,	)	APR 1 1997
	)	Clerk, U.S. District Court
Defendant.	)	Central District Of California
_____	)	

This court having granted summary judgment in favor of defendant UNITED STATES OF AMERICA,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Gary B. Jefferson shall have and recover nothing by way of his complaint.

Dated: March 31, 1997

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

APPENDIX D.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY B. JEFFERSON	) CASE No. 97-55822 RMT
	) (BQRx)
Plaintiff,	)
	) ORDER DENYING
vs.	) PLAINTIFF'S MOTION
	) FOR RECONSIDERATION
UNITED STATES OF AMERICA,	)
	) **ENTERED**
Defendant.	) MAY 23 1997
_____	) Clerk, U.S. District Court
	Central District Of California

This matter having come before the court on the motion by plaintiff GARY B. JEFFERSON for reconsideration pursuant to Fed.R.Civ.P. 59(e), and the court having considered the pleadings and other documents filed herein, and determined that plaintiff fails to present an intervening change in the controlling law, availability of new evidence not previously available or need to prevent clear error of law or prevent manifest injustice,

IT IS HEREBY ORDERED that plaintiff's motion for reconsideration is DENIED.

Dated: May 21, 1997

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

APPENDIX E.

MEMORANDUM TO THE DIRECTOR
IN THE CASE OF GARY JEFFERSON
FILE #90043-13-696980 (CR 82 at pg. 53)

November 28, 1995

The issue for determination is whether the claimant's October 21, 1994 reconsideration request is timely filed, and whether the case requires re-opening under 5 U.S.C. 8128 (a).

The claimant, date of birth February 14, 1954, was employed by the US Postal Service in Inglewood, California. He timely filed Form CA-1, Notice of Traumatic Injury, occurring on January 11, 1983. His case was accepted for the conditions of contusions; back and left elbow; lumber dorsal sprain, L5-S1 disc permanent aggravation with left sided radiculopathy as a result of an attack by a dog while he was delivering mail. Later the accepted conditions expanded to include depression. Mr. Jefferson's benefits were suspended effective August 3, 1984, as he refused a suitable light duty job offer by the US Postal Service. This decision has been upheld by reconsiderations dated April 4, 1990; July 18, 1990; July 16, 1991; and January 7, 1992. It was also upheld by the Branch of Hearings and Review on May 16, 1985, and the Employees' Compensation Appeals Board on January 31, 1986 and April 9, 1993.

On October 21, 1994, Mr. Jefferson filed for reconsideration under 5 U.S.C. 8128 of the FECA. Three medical reports are mentioned in the reconsideration request, and are included in the case file.

A July 7, 1994 report from Dr. Bruce Frome, Board certified in Family Practice and Anesthesiology, diagnoses herniated nucleus pulposus at L4-5 and L5-S1 with right sciatica and neuropathy of L4-5, L5-S1 on the right as well as drop foot on the left; and reflex sympathetic dystrophy of the right lower extremity. He believes the condition is causally related to the 1983 work injury.

An April 21, 1992 neurological consultation with Dr. Robert Giombetti diagnoses intractable low back pain with bilateral L5-S1 radiculopathy, worse on the left, secondary to the L4-S1 disc herniation and subsequent degenerative changes. Dr. Giombetti states there is reasonable medical certainly that this patient's persistent symptomology arose secondary to his industrial trauma, as described.

An April 1, 1992 report from Dr. Sherman Hershfield, neurologist and psychiatrist, diagnoses: intractable constant, moderate to severe pain secondary to lumbar disc disease, cervical disc disease, thoracic disc disease; headaches; post traumatic anxiety syndrome. Dr. Hershfield states the patient is experiencing the symptoms primarily from his work-related injury.

Mr. Jefferson states all these reports indicate all injuries are causally related to the January 11, 1983 injury in question.

APPENDIX F.

Admissions and Responses 31, 32, and 34 (C.R. 69)

ADMISSION NO. 31:

Admit that in 1990 an employee of the United States Postal Service solicited, in writing, a medical opinion from the IME Herbert A. Robinson, M.D., J.D. regarding the plaintiff's physical capacity to perform certain physical tasks.

RESPONSE TO ADMISSION NO. 31:

Deny.

ADMISSION NO. 32:

Admit that in 1990 an employee of the United States Postal Service solicited, in writing, a medical opinion from the IME Herbert A. Robinson, M.D., J.D.

RESPONSE TO ADMISSION NO. 32:

Deny.

ADMISSION NO. 33:

Admit that in 1990 an employee of the United Department of Labor solicited, in writing, a medical opinion from the IME Herbert A. Robinson, M.D., J.D. regarding the plaintiff's physical capacity to perform certain physical tasks.

RESPONSE TO ADMISSION NO. 33:

Deny.

ADMISSION NO. 34:

Admit that in 1990 an employee of the United States Postal Service solicited, in writing, a medical opinion from the IME Herbert A. Robinson, M.D., J.D.

RESPONSE TO ADMISSION NO. 34:

Deny.

ADMISSION NO. 35:

Admit that the content of Herbert A. Robinson's written response to the United States Postal Service's April 27, 1990 written inquiry was utilized by OWCP in the decision making process of the plaintiff's underlying federal worker's compensation claim.

RESPONSE TO ADMISSION NO. 35:

Deny.

ADMISSION NO. 36:

Admit that the content of Herbert A. Robinson's written response to the U.S. Department of Labor's April 27, 1990 written inquiry was utilized by ECAB in the decision making process of the plaintiff's underlying federal worker's compensation claim.

RESPONSE TO ADMISSION NO. 36:

Deny.

ADMISSION NO. 37:

Admit that the content of Herbert A. Robinson's written response to the United States Postal Service's April 27, 1990 written

APPENDIX G.

of Telephone or Office Call; Ex. 5 at 34, paragraph 5. The OWCP

> "explained [to Dr. Robinson] that if additional information is needed re: the light duty offer to render his opinion, he should so indicate and [OWCP] would be glad to obtain the additional information." Id.

In July, 1988, the OWCP merely returned Dr. Robinson's telephone call, heard Dr. Robinson voice his concern regarding the light duty job offer's psychiatric aspects not being addressed, and offered to obtain any additional information Dr. Robinson needed to render his opinion, if the doctor should request any information from OWCP. Id. There was nothing "illegal" about this conversation with Dr. Robinson. This telephonic contact with Dr. Robinson was not regarding a "disputed issue." See In the Matter of George A. Johnson and U.S. Postal Service, 43 E.C.A.B. 712 (1992), attached hereto as Ex. 7.

Furthermore, plaintiff's claim that this conversation violated 5 U.S.C. section 8123 is clearly without merit. Section 8123, Physical Examinations, provides, inter alia, that an employee is required to

> "submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required."

Plaintiff's claim as to defendant's alleged violation of this section is unintelligible and nonsensical. Defendant has not "violated" this provision. Section 8123 does not provide plaintiff with a cause of action for any violation. Plaintiff's

whether the surgeries were necessitated by the work injury. The Office noted that it was "essential" that the doctor provide rationale in support of his opinion.

In a January 31, 1991 report, Dr. Sturman stated:

> "[Appellant's] history gave no episode of injury while at work. As a matter of fact, his symptoms came on [after] having just rolled over in bed on a morning when he had not been working. It is my...opinion that his ruptured intervertebral disc which required surgical intervention was in no way related to his employment, inasmuch as there is no history of any injury at work."

**5 In a February 22, 1991 telephone conversation report, an Office claims examiner indicated that he spoke with an employee of Dr. Sturman. The claims examiner stated:

> "Discussed about problem - suppl[emental report] does not address factors of employment. She will talk to the doctor and let me know by [tele]phone."

In a February 26, 1991 telephone conversation report, an Office claims examiner indicated that he telephoned Dr. Sturman's office and spoke with an employee of Dr. Sturman. The employee advised the claims examiner that Dr. Sturman did not believe that the ruptured disc was "in any way related to employ[ment] factors." The employee advised that Dr. Sturman had sent or would send an addendum to his previous reports.

In a February 25, 1991 report, received March 6, 1991, Dr. Sturman stated:

> "[I]t is my... opinion that [appellant's claimed injury] is in no way related to his work history. This is an opinion that takes his work duties into consideration."

*716 By compensation order dated March 26, 1991, The Office rejected appellant's claim on the grounds that the evidence did not demonstrate causal relationship between his claimed condition and work factors. In an accompanying memorandum, the Office concluded that Dr. Sturman's reports represented the weight of the medical evidence and established that appellant's back condition was not work related.

The Board finds that the case is not in posture for a decision due to an unresolved conflict in the medical opinion.

The Office properly found that a conflict in the medical evidence existed between Dr. Gracias, for appellant, and an Office medical adviser. Therefore, it was proper for the Office to refer appellant to Dr. Sturman, an impartial medical examiner. [FN1] However, the Board finds that the November 27, 1990 and January 31, 1991 reports of Dr. Sturman are not entitled to special weight because they contain little medical rationale supporting the doctor's conclusion [FN2] and that the February 25, 1991 report was improperly obtained. In his November 27, 1990 report and in his January 31, 1991 supplemental report, Dr. Sturman provided little medical rationale for his opinion that appellant's claimed back condition was not work related. In his initial report, Dr. Sturman provided no reasoning for his conclusion other than to state that appellant had related "no specific injury at work" and that it was "not unusual to roll out of bed and rupture a disc." The doctor did not address why work factors outlined in the statement of accepted facts would have played absolutely no role in appellant's back condition. The doctor also was, apparently, under the impression that some "specific injury" at work was necessary in order for appellant's subsequent condition to be work related.

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43 E.C.A.B 712
(Cite as: 43 E.C.A.B. 712, *716, 1992 WL 696449, **5 (E.C.A.B.))

However, in these circumstances involving an occupational disease claim, there is no requirement that appellant's condition be caused by a "specific injury" or incident [FN3] at work or that it be caused by an unusual amount of stress or exertion. [FN4] In his January 31, 1991 supplemental report, Dr. Sturman addressed causal relationship by essentially repeating his opinions *717 from his November 27, 1990 report. The doctor again seemed to base his opinion on the lack of a report of "an episode of injury while at work." In neither report did the doctor address appellant's work factors, as listed in the statement of accepted facts, and provide a medically rationalized discussion explaining how such factors would or would not contribute, in any way, to appellant's back condition and need for surgery.

**6 The Board also finds that Dr. Sturman's February 25, 1991 report was improperly obtained and must be excluded from the record.

The Board notes that the February 25, 1991 supplemental report followed, and was apparently submitted in response to, February 22 and February 26, 1991 telephone conversations between an Office claims examiner and Dr. Sturman's office. In the February 22, 1991 telephone conversation, the claims examiner noted that she "discussed" a problem - the lack of a discussion of employment factors in Dr. Sturman's January 31, 1991 report. In the February 26, 1991 telephone conversation, the claims examiner noted that a person in Dr. Sturman's office indicated that the doctor did not believe that appellant's ruptured disc was due to work factors. This person noted that a supplemental report would be sent or had been sent.

In Carlton Owens, [FN5] the Board held that oral communications or conversations between the Office and the impartial medical examiner on disputed issues should not occur, as it undermines the appearance of impartiality that is crucial to a referee opinion. In Edward E. Wright, [FN6] the Board applied the principles of Owens to a

situation where the communication was with the physician's office personnel. [FN7].

The Board finds that the Office's February 22 and February 26, 1991 telephone conversations with Dr. Sturman's office did raise the appearance of impropriety because disputed issues were discussed. The disputed issue discussed in the February 22, 1991 telephone conversation involved the claims examiner's attempt to have the doctor discuss employment factors. As the point at issue in this case is whether employment factors caused or aggravated appellant's *718 claimed condition and his need for surgeries, a discussion concerning employment factors involves a disputed issue.

The disputed issue discussed in the February 26, 1991 telephone conversation was whether appellant's ruptured disc is work related. Since the essence of appellant's claim concerns whether his ruptured disc and need for surgery is work related, a telephone conversation in which the doctor's opinion on this subject is discussed involves a disputed issue.[7] While the language of the February 26, 1991 telephone conversation memorandum is unclear regarding whether Dr. Sturman's February 25, 1991 report was sent before or after the February 26, 1991 telephone conversation occurred, there is no evidence establishing that this telephone conversation occurred after the February 25, 1991 supplemental report was sent. Therefore, in the interest of maintaining the appearance of impartiality that is crucial to a referee opinion, it cannot be considered as having been sent before the February 26, 1991 telephone conversation occurred. In any event, the February 22, 1991 telephone conversation, as noted above, also involved a disputed issue.

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[7]Similiarly, Jefferson's benefits were terminated based upon the "disputed issue" that plaintiff refused suitable light duty work re a "disputed issue"; the light duty job offer's psychiatric aspects not being addressed per the Independent Medical Examiner himself.

43 E.C.A.B. 712
(Cite as: 43 E.C.A.B. 712, *718, 1992 WL 696449, **6 (E.C.A.B))

Consequently, the February 25, 1991 supplemental report was improperly obtained and must be excluded from the case record. [FN8] Because the conflict in the medical evidence remains, the Office should refer appellant to an appropriate impartial medical examiner not previously associated with the case for resolution of the conflict on the issue of whether appellant's back condition and surgeries were causally related to employment factors. [FN9] After such further development as is necessary, the Office shall issue a de novo decision. [FN10]

**7 The March 26, 1991 Office of Workers' Compensation Programs' decision is set aside and the case remanded for further action consistent with this decision.

FN1 5 U.S.C. s 8123(a), in pertinent part provides:

> "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

FN2 See Aubrey Belnavis, 37 ECAB 206, 212 (1985) (where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight).

FN3 See 20 C.F.R. s 10.5(a) (16). This subsection defines an occupational disease or illness as

> "a condition produced in the work environment over a period longer than a single workday or work shift by such factors as systemic infection; continued or repeated stress or strain; or exposure to hazardous elements ..."

FN4 See Anna Strehl (William Strehl), 2 ECAB 74, 79 (1948) (where the Board held that there is no necessity for a showing of unusualness or extraordinariness in the factors producing disability since ordinary or normal working conditions can, in some situations, be competent producers of disease).

FN5 36 ECAB 608, 616 (1985).

FN6 41 ECAB 1017 (1990)

FN7 The Office's procedure direct:

> "if clarification or additional information is needed, the claims examiner will write to the specialist to obtain it. Under no circumstances ... should the claims examiner telephone the specialist for elaboration of the report as information obtained ... cannot be considered probative and bias may be inferred as a result."

Federal (FECA) Procedure Manual, 3-500.5 (b) (2) (October 1990). These procedures also require the exclusion of an impartial medical examiner's report where the report is "obtained through telephone contact or submitted as a result of such contact." Id at 3-500.6 (c).

FN8 Wright, supra note 6; Owens, supra note 5.

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APPENDIX H.

STATEMENT OF FACTS

Petitioner's claims, one through four listed below, are both continuous and unlawful; continuing up to and through 1996. Respondent does not deny allegations but instead plead exemptions under the F.E.C.A. to which none were applicable as validated by appellate court jurisdiction. Petitioner should have benefited from the holding in **Doe**:

> "To toll the statute of limitations under *continuing violations* doctrine, plaintiff must show more than the occurrence of isolated or sporadic acts."

Under *continuing violations* theory pursuant to which statute of limitations is tolled if defendant is engaged in a pattern of continuing violations until the course of conduct is complete, where the last act alleged to be part of the ongoing pattern occurs within the filing period, allegations regarding earlier acts are not time barred. Petitioner submitted affidavits, declarations, and admissions under oath by agents of the defendant admitting to or proving that a *pattern of conduct* exists where:

1. Documents were repeatedly tampered with, falsified or secretly substituted for the purpose of controversion and omission of facts to support a denial of benefits (i.e., physician reports and forms; affidavits; etc.) See Admissions 31, 32, and 34. **(C.R. 69 at page 30 and 31--attached hereto as Appendix D).** Compare answers to defendant's response in **Appellee's Brief at page 7, footnote 4.** Defendant states:

> "It is clear that Jefferson had knowledge of the April 27, 1990 letter at least as early as 1992, if not earlier. In a deposition on August 12, 1992, in a Los Angeles County Superior Court case where Jefferson was the plaintiff in that state court action,

> Independent Medical Examiner Dr. Robinson was questioned about the April 27, 1990 letter from the Postal Service."

Thus petitioner should have benefited from the theory of fraudulent concealment, **Holmberg v. Armbrecht,** 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946). (Quoting **Bailey v. Glover,** 88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 (1874), **Hohri v. United States,** 782 F2d. 227 (D.C. Circuit) where the defendant is "impeached" and later submits testimony that corroborates the petitioner's claims as viable genuine factual issues affecting the calculation of accrual (i.e., fraud, deceit, and concealment of vital information that prevented the petitioner from alleging a crucial element of his claim, namely, that these were continuous torts--"a pattern" of both continuous and unlawful conduct).

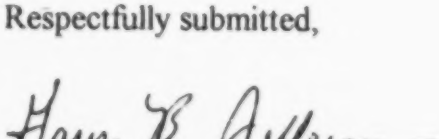
2. 5 U.S.C. 8123 was repeatedly violated for the purpose of controversion and omission of facts to support a denial of benefits; (i.e., illegal telephone calls; **See C.R. 84 at page 23 in light of C.R. 84 at pages 66 - 68**; **attached hereto as Appendix E**; intimidation; inaccurate, outdated, biased physician referral forms **(See C.R. 82 at page 56)**, including the "Statement of Accepted Facts"; illegally substituted physician referral forms; **See C.R. 82 at page 40 (Original Calliet Report)** and the illegal substituted report **(C.R. 82 at pages 41 - 43)** as authorized by "OWCP" **(C.R. 82 at page 58)**

3. Policies, regulations (20 C.F.R. 10.140), and mandatory directives were repeatedly violated for the purpose of controversion and omission of facts to support a denial of benefits; (i.e.; lack of psychological testing by all "OWCP" referral physicians **(C.R. 88 at page 25; C.R. 88 at page 36)**; malingering up to 3 years at a time in processing claims causing inaccurate, outdated, biased, physician referral forms, including the "Statement of Accepted Facts"; **See at pages 30 - 32 (Admissions and Responses 177 - 182) and C.R. 82 at pages 47 - 50 (Attachments);** lack of second opinions on matters in dispute. **See C.R. 82 at page 33 (Admission and Response 34).**

4. All torts were continuous up to and through 1996, including recurrent acts that constituted gross negligence, collusion, and bad faith; before and after the fact, for the purpose of controversion, evading judicial review and omission of facts to support a denial of benefits.

DATED: June 15, 1999

Respectfully submitted,



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